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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

STANLEY WAYNE DOMINO, JR.,

Defendant and Appellant.

A153973

(San Mateo County
Super. Ct. No. SC082860)

Defendant Stanley Wayne Domino, Jr., was convicted of reckless vehicular evasion of a peace officer. Shortly after the trial concluded, the prosecution disclosed that its primary witness, Daly City Police Officer Nick Ottoboni, had been the subject of an investigation by the district attorney's office. That investigation concluded Ottoboni had probably made misrepresentations about evidence in a prior case. Defendant filed a motion for new trial, which was denied by the trial court. On appeal, defendant contends the prosecution's failure to timely disclose the information about Ottoboni's credibility constituted a *Brady*¹ violation. We agree and reverse the order denying his motion for new trial.

I. BACKGROUND

Defendant was charged by amended information with evading a police officer while driving with a willful or wanton disregard for safety (Veh. Code, § 2800.2, subd. (a); count 1), and resisting and obstructing an officer (Pen. Code, § 148,

¹ *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

subd. (a)(1); count 2). The charges arose from a car chase between Officer Ottoboni and a black Acura.

At trial, Ottoboni testified he ran the license plate of an Acura in front of his patrol car as part of his standard patrol protocol. Upon learning the Acura's registration was suspended, Ottoboni followed the car as it made a left turn and then attempted to initiate a traffic stop. The Acura accelerated and Ottoboni pursued the vehicle.

When the Acura entered a residential area, Ottoboni was instructed to discontinue pursuit. Ottoboni testified he immediately terminated pursuit and lost sight of the vehicle. He testified he continued driving in the same direction as the Acura while looking for the vehicle. Ottoboni stated he located the Acura wedged between a "fence in front of a home and the telephone pole on the sidewalk," with extensive damage to the fence, the Acura, and a parked vehicle. Upon exiting his patrol car, he checked to see if anyone was inside the Acura. The car was empty, but Ottoboni saw defendant running down the street. Ottoboni chased defendant, who turned and looked over his shoulder at Ottoboni. Ottoboni was unable to catch defendant and returned to the Acura.

Ottoboni searched the vehicle and found a gray baseball cap on the driver's seat, a set of keys in the ignition, and various electrical devices. The keys appeared to be unaltered factory keys, and none of the windows were broken. Ottoboni discovered the car was registered to defendant and obtained a photograph of defendant from the DMV records. Ottoboni stated he "immediately" recognized the individual in the DMV photograph as the person he saw driving the Acura. Ottoboni testified he had an approximate two-second view of the Acura driver when the car initially turned left, as well as another one- or two-second view of the driver's face while chasing him on foot. Ottoboni identified defendant as the driver of the Acura. The police also conducted a DNA test on the cap, which indicated two sources of DNA: defendant and an unidentified minor contributor.

Defendant testified in his own defense. Defendant acknowledged owning the vehicle, but stated it had been stolen. Defendant testified he had been in Fairfield at the time of the incident and was not the driver observed by Ottoboni. Defendant stated he

attempted to report the vehicle stolen, but was unable to do so because no one answered the telephone at the Bay View police station. Defendant testified he did not make any further attempts to report the car as stolen because “it wasn’t worth anything.”

The jury found defendant guilty of evading a police officer while driving with a willful or wanton disregard for safety (count 1). No verdict was reached on count 2, and the prosecution dismissed that count with prejudice.

Defendant subsequently moved for a new trial. His motion was initially based on the prosecution’s delay in informing him of two prior reprimands in Ottoboni’s file regarding pursuits. Thereafter, the prosecution informed defendant of an investigation conducted by the district attorney’s office into Ottoboni regarding evidence in another case, *People v. Bundalian* (Super. Ct. San Mateo County, No. SC-083229) (*Bundalian*).² The Bureau of Investigation of the San Mateo County District Attorney’s Office (Bureau of Investigation) investigated statements by Ottoboni that he had viewed incriminating incoming text messages automatically appearing on a defendant’s cellphone. Ottoboni made these statements in preliminary hearing testimony, as well as in declarations attached to three search warrants. However, District Attorney Inspector Matt Broad conducted two forensic examinations of the cellphone at issue, the results of which indicated the messages could not appear in the manner alleged by Ottoboni. Specifically, Broad determined Ottoboni’s testimony had to have been untrue because the messages could only have been viewed by manually manipulating the phone. While Ottoboni offered a theory by which he could have viewed the messages, Broad concluded the theory was an “unlikely possibility” because it depended on various preexisting conditions (i.e., previous text messages from the same sender that were open when the phone went to sleep) that did not exist (i.e., there were no prior text messages from that same sender).

² There also are allegations Ottoboni was “untruthful under oath” in a third case, *People v. Ison* (Super. Ct. San Mateo County, No. SC-083628). However, defendant primarily focuses on the allegations against Ottoboni arising from the *Bundalian* case.

Defendant filed a supplement to his motion for new trial based on this new information. Defendant's supplemental motion asserted the prosecution failed to disclose *Brady* material, evidencing Ottoboni "knowingly lied or made misrepresentations related to his investigation" in *Bundalian*.

The prosecution opposed the motion, arguing it was not reasonably probable the evidence of the *Bundalian* investigation would result in a different outcome. The prosecution noted Ottoboni's testimony had not conclusively been proven untrue, litigation on the credibility issue would have created a "significantly long 'trial within a trial,' " and sufficient corroboration was presented to support Ottoboni's testimony.

The trial court denied the motion, despite noting it "found some issues of credibility with Officer Ottoboni" and asking, "Why is he still there? I don't even get it." It ultimately concluded substantial evidence supported the verdict apart from any issues of credibility regarding Ottoboni. The court suspended imposition of sentence and placed defendant on three years' probation, including six months in jail and the imposition of various fines and fees. Defendant timely appealed.

II. DISCUSSION

Defendant contends in part his conviction for evasion must be reversed because his motion for new trial based on the prosecution's *Brady* violation was improperly denied. He claims the prosecution withheld material evidence that undermined the credibility of its main witness, Ottoboni. We agree.³

"On appeal, a trial court's ruling on a motion for new trial is reviewed under a deferential abuse of discretion standard. [Citation.] Its ruling will not be disturbed unless defendant establishes 'a "manifest and unmistakable abuse of discretion." ' " (*People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27, reversed on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 636–643.)

³ Defendant also asserts the trial court erred by (1) refusing to continue the trial so he could file a motion seeking discovery of law enforcement personnel records, and (2) not exercising its discretion when imposing defendant's jail term. We need not address these arguments in light of our conclusion that defendant is entitled to a new trial.

“Under *Brady*, the prosecution violates a defendant’s federal due process rights when it suppresses evidence material to the defendant’s guilt or punishment, regardless of the good faith belief of the prosecution. [Citation.] Prosecutors have a duty to disclose ‘material exculpatory evidence whether the defendant makes a specific request [citation], a general request, or none at all [citation].’ [Citation.] There are three elements to a *Brady* violation: (1) the state withholds evidence, either willfully or inadvertently, (2) the evidence at issue is favorable to the defendant, either because it is exculpatory or impeaching, and (3) the evidence is material.” (*People v. Lewis* (2015) 240 Cal.App.4th 257, 263.) “A determination that the prosecution violated its disclosure obligations under *Brady* . . . requires reversal without any need for additional harmless error analysis.” (*In re Bacigalupo* (2012) 55 Cal.4th 312, 334.) We apply a de novo standard of review to the issue of whether the defendant established the elements of a *Brady* claim. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*).)

The Attorney General concedes the second element of a *Brady* violation: the evidence regarding Ottoboni’s credibility was favorable to defendant. Accordingly, we focus our discussion on the first and third elements.

A. Whether the State Withheld Evidence

The Attorney General asserts the credibility issues with Ottoboni “did not come to the attention of the prosecutor in this case until March 2017,” and any delay in disclosure was “inadvertent.” Neither justification excuses the prosecution’s nondisclosure prior to trial.

“Responsibility for *Brady* compliance lies exclusively with the prosecution” (*In re Brown* (1998) 17 Cal.4th 873, 878 (*Brown*).) “The scope of this disclosure obligation extends beyond the contents of the prosecutor’s case file and encompasses the duty to ascertain as well as divulge ‘any favorable evidence known to the others acting on the government’s behalf’ [Citation.] Courts have thus consistently ‘decline[d] ‘to draw a distinction between different agencies under the same government, focusing instead upon the ‘prosecution team’ which includes both investigative and prosecutorial personnel.” ’ ” (*Id.* at p. 879; see *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th

1, 8 [the *Brady* disclosure requirement “encompasses evidence ‘known only to police investigators and not to the prosecutor’ ”].) Thus, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.) As the California Supreme Court emphasized in *Brown*, “the Supreme Court has unambiguously assigned the duty to disclose solely and exclusively to the prosecution; those assisting the government’s case are no more than its agents. [Citations.] By necessary implication, the duty is nondelegable at least to the extent the prosecution remains responsible for any lapse in compliance. Since the prosecution must bear the consequences of its own failure to disclose [citations], a fortiori, it must be charged with any negligence on the part of other agencies acting in its behalf [citations].” (*Brown*, at p. 881.)

The prosecutor had a duty to inform defense counsel of the credibility issues surrounding Ottoboni, but she failed to do so until after defendant’s trial was completed. While the prosecutor in this case may have been unaware of the investigation prior to defendant’s trial, her office was not. The statements by Ottoboni under investigation occurred between April 2015 and March 2016. The discrepancy in Ottoboni’s testimony was identified in March 2016 as part of *Bundalian*’s pretrial briefing. The Bureau of Investigation then confirmed the credibility issue in March 2016—almost a year before defendant’s trial began in February 2017. Thus, the prosecutor’s colleagues, who were handling the *Bundalian* matter, and Inspector Broad were all aware of the credibility issues in March 2016. The prosecutor “ha[d] a duty to learn of any favorable evidence known to the others acting on the government’s behalf,” and she failed to do so. (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 437.)

Nor is the “inadvertence” of any delay relevant. The withholding element of a *Brady* violation may occur “either willfully *or inadvertently*.” (*People v. Lewis*, *supra*, 240 Cal.App.4th at p. 263, italics added.) The Attorney General’s brief concedes as much. Accordingly, the first element for a *Brady* violation has been met.

B. Materiality of Withheld Evidence

The third element that must be established for a *Brady* violation is, by failing to turn over the evidence at issue, the prosecution caused the defendant to suffer prejudice. (*Salazar, supra*, 35 Cal.4th at p. 1043.) This element has been described as a requirement “that the suppressed evidence be material, ‘for not every nondisclosure of favorable evidence denies due process.’ ” (*Id.* at p. 1049.) For the purposes of a *Brady* analysis, “ ‘[e]vidence is material if there is a reasonable probability its disclosure would have altered the trial result.’ [Citation.] Put another way, the defendant must show that ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’ [Citation.] ‘Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies.’ ” (*People v. Lewis, supra*, 240 Cal.App.4th at p. 263.) However, “ ‘ “[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” ’ ” (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 52.)

The Attorney General argues the evidence at issue was not material because Ottoboni’s testimony was corroborated by physical evidence.⁴ Specifically, the Attorney General notes the vehicle was registered to defendant and not reported as stolen, a baseball cap containing defendant’s DNA was located in the vehicle, and there was no evidence the car had been stolen. The Attorney General further contends the prosecution could have rehabilitated Ottoboni by explaining the *Bundalian* investigation did not conclusively demonstrate Ottoboni lied and Ottoboni was not fired for his conduct.

⁴ The Attorney General also asserts Ottoboni’s testimony was supported by defendant’s testimony. However, defendant asserts the defense strategy would have “changed substantially” with the impeachment evidence from *Bundalian*, and he likely would not have testified. Accordingly, we assess whether the physical evidence, alone, could provide sufficient corroboration for Ottoboni’s testimony.

We disagree the other evidence presented at trial offers sufficient corroboration to uphold the verdict. Ottoboni's testimony provided the sole identification of defendant as the Acura's driver. No other officer or witness observed the driver of the Acura or the individual running away from the Acura. " 'In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime" [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case [citations].' " (*Salazar, supra*, 35 Cal.4th at p. 1050.) In this instance, none of the remaining evidence demonstrates who was driving the vehicle. The Acura's registration demonstrates defendant was the owner of the vehicle. But it does not indicate he was the driver at the time of the incident. Likewise, the cap containing defendant's DNA does not demonstrate defendant was the driver of the vehicle. Rather, it merely reconfirms defendant was the owner of the vehicle and left certain possessions inside his car.

The strongest evidence in support of the prosecution's case is the lack of broken windows, the absence of any report that the car was stolen, and the discovery of factory keys (rather than shaved keys) in the ignition. But these facts do not exclude the possibility the car or defendant's keys were stolen.

The corroborating evidence here is distinctly less than in other cases in which no *Brady* violation was found. For example, in *People v. Lewis, supra*, 240 Cal.App.4th 257, the defendant moved for a new trial because an officer involved in his arrest was subsequently charged with various acts of criminal wrongdoing. (*Id.* at pp. 261–262.) The trial court denied the motion because the defendant's testimony of events was not only highly questionable but another officer's testimony corroborated the events at issue. (*Id.* at p. 262.) This court affirmed, concluding there was no *Brady* violation. (*Lewis*, at p. 265.)

Here, the *Bundalian* investigation raises serious questions regarding Ottoboni's credibility, and no other witness's testimony is available to corroborate Ottoboni's identification. Whether the findings of the *Bundalian* investigation are material turns on an assessment of whether those findings " 'undermine confidence in the verdict.' "

(*People v. Lewis*, *supra*, 240 Cal.App.4th at p. 263.) As explained in *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1482, “This, we believe, is *something more* than a conclusion that the outcome *may have been different* had the [*Brady* materials] been available, but *something less* than defendant’s being required to ‘demonstrate that after discounting the inculpatory evidence in light of the [*Brady* materials], there would not have been enough left to convict.’ ” In considering the potential impact of the *Bundalian* investigation on Ottoboni’s credibility, the lack of any other eyewitness testimony identifying defendant as the driver, and the secondary source of DNA on the cap found in the vehicle, we find a reasonable probability exists the jury would have reached a different outcome had the prosecution not suppressed this evidence.

“[T]he purpose of the *Brady* rule is ‘to ensure that a miscarriage of justice does not occur.’ ” (*People v. Uribe*, *supra*, 162 Cal.App.4th at p. 1482.) Because defendant established the requisite three elements, we conclude the trial court erred by denying defendant’s motion for new trial.

III. DISPOSITION

The order denying defendant’s motion for new trial is reversed, and the trial court is ordered to grant defendant’s motion for new trial.

Margulies, J.

We concur:

Humes, P. J.

Banke, J.

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